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IN THE

Supreme Court of the United States

October Term, 1958
No. 644

THEODORE J. CHAPIN and ADAM SYDLIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners' Reply to Brief for the United States in Opposition.

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Petitioners have never contended that the relationship of a member of the Armed Services to his employer is "unique." The Court of Appeals has said that the relationship is "unique" and "peculiar." (Appx. 6, 7 and 10.) Petitioners ask this court to require the lower courts, in applying the law of California, to consider all of the facts which arise out of the military relationship, including the requirement that such employee, in order to receive per diem and reimbursement for travel, must be upon public business, and that the government has the right to prevent a member of the Armed Forces from using his own private automobile when transferred from a permanent duty station. Petitioners ask only that the lower courts consider

the stipulations of fact and findings in regard to the control of a member of the Armed Forces by the government and requirements and provisions of the statutes, Army Regulations, and joint travel regulations which were cited both to the District Court and Circuit Court and ignored by them on the theory that the relationship of a military man to his employer is "unique" and cannot be considered.

Petitioners believe this court will require the lower courts to follow the provisions of *Williams v. United States*, 350 U. S. 857, in applying the local law to *all* of the facts, including the special factors characteristic of military activity and discipline as the 5th Circuit did in the case of *Hinson v. United States*, 257 F. 2d 178. The Court of Appeals in the present case has paid lip service to the *Williams* case, but in ignoring the special factors characteristic of military activity and discipline, has applied its own standards with respect to the determination of the relationship of a military man to his employer. The Court of Appeals has not, as required by the case of *Loper v. Morrison* (1944), 23 Cal. 2d 600, 605, 145 P. 2d 1, 3, considered *all* of the relevant circumstances and weighed them in relation to one another.

Since the government did not petition for certiorari in the *Hinson* case, which is factually identical to the case at bar, we must assume that the government concurred with the 5th Circuit in its approach respecting the special factors characteristic of military activity and discipline. If such be the case, either the case at bar is wrong or the *Hinson* case is wrong.

If the Court of Appeals had considered the special factors of military activity and discipline and had made ap-

propriate factual substitutions, assuming the case of *McVicar v. Union Oil*, 138 Cal. App. 2d 370, 292 P. 2d 48, to be correct, the court would have found the following:

The soldier was caused to be transferred by orders and under appropriate regulations he was entitled to per diem and reimbursement for travel only if transferred by the government and only if he was engaged on public business. The Army had the right to control the route, the time, the mode of transportation, and any other factor of the soldier's transfer from base to base. He was required to depart at a certain time and to arrive at a certain time. If the soldier did not arrive in time or drive a car that had a faulty mechanical condition or in a reckless or wilful manner, the soldier could have been courtmartialled. The Army had the right to prevent the soldier from taking his automobile on the transfer and could have insisted that he travel by transportation designated by the Army. Only by ignoring those facts on the theory that the relationship of a soldier to the Army is "unique" or "peculiar" could the Court of Appeals and the District Court, under the law of California, have arrived at the conclusion that the soldier was not within the course and scope of his employment.

The same District Court Judge who decided the case at bar in *Marquardt v. United States* (S. D. Cal., 1953), 115 Fed. Supp. 160, in applying what he thought at that time to be the California law, found an employee of the Army Engineers within the scope of his employment because, while using his private automobile, he was to be reimbursed for travel expenses and, hence, must have been on public business. The Court of Appeals for the Ninth Circuit in *United States v. Kennedy*, 230 F. 2d 674, apply-

ing the law of Washington on identical facts, held a member of the Armed Forces to be within the scope of his employment. No matter what the government's attorneys admitted, or did not admit in the *Kennedy* case, under Section 1346(b) of Title 28, no suit can be maintained against the United States unless the employee was acting within the scope of his employment, under the circumstances set forth in that section. Such requirement goes to the heart of jurisdiction to make an award. It should also be noted that the law of Georgia, New Mexico, California, and Washington, is identical on the issues of scope of employment.

Furthermore, the California cases which have been distinguished by the Circuit Court and by the counsel for the government, on the theory of special errand or benefit of the employer, stand for the proposition that the use of a private automobile by the employee will not take the employee out of the scope of such employment, if the other factors are present. In the present case, the only fact which takes the employee out of the scope of his employment is the fact that he was using his private automobile. All other facts stipulated, if considered by the lower courts, must place the soldier within the course and scope of his employment.

Therefore, it is respectfully submitted that, without regard to the erroneous granting of a motion for summary judgment, in view of the factual inferences arising from the stipulated facts, the petition should be granted because of the basic differences of the Court of Appeals and the District Court from the decisions of other Circuit Courts applying identical law, and because of the failure of the Circuit Court to follow the case of *Williams v. United*

States, by removing from consideration in applying the state law, the special factors characteristic of military activity and discipline.

Respectfully submitted,

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